No. 41

IN THE

Supreme Court of the United States

October Term, 1947

THE UNITED STATES OF AMERICA,

Appellant,

—v.—

SCOPHONY CORPORATION OF AMERICA, GENERAL PRECISION EQUIPMENT CORPORATION, TELEVISION PRODUCTIONS, INC., PARAMOUNT PICTURES, INC., SCOPHONY LIMITED, *et al.*

ON APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF NEW YORK

BRIEF ON BEHALF OF APPELLEE SCOPHONY, LIMITED.

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Opinion Below

The opinion of the court below (R. 58-63) is reported in 69 F. Supp. 666.

Jurisdiction

The jurisdiction of this Court is invoked pursuant to Section 2 of the Expediting Act of February 11, 1903, 32 Stat. §823, 15 U. S. C. §29, and Section 238 of the Judicial

Code, as amended by Act of February 13, 1925, 43 Stat. §§936, 938, 28 U. S. C. §345. Probable jurisdiction was noted on March 10, 1947 (R. 265).

Statement of the Case

This is a civil action brought by the United States for alleged violations of the Sherman Act (R. 3-43). The Government's appeal is taken from a judgment of the District Court for the Southern District of New York, quashing the service upon, and dismissing the Government's complaint against, appellee Scophony, Limited (hereinafter referred to as "Limited") (R. 66). The basis for the Court's decision was its holding that Limited was not at the time of such service subject to the process of that Court (R. 58-63).

The general background facts prior to 1943 are set forth in the Government's Brief, pages 3-16, and are not repeated here because they are not essential to the determination of the question on this appeal. There are, however, some important omissions of pertinent facts in the Government's Statement of the Case which compel a statement herein of the facts material to the issue before this Court.

Limited is a corporation organized under the laws of Great Britain with offices in the City of London, England (R. 4). The Record does not support the Government's contention that Limited is engaged in the United States in the business of patent development and exploitation (Gov't Brief, 25-27). As the Court below found (R. 60), Limited's business is that of manufacturing and selling television apparatus. Although it is the owner and licensor of inventions pertaining to television reception and transmission systems (R. 4, 60), since 1942, it has not owned any

American patents covering the transmission and television fields (R. 21).

Service of process upon Limited was attempted on December 20, 1945 by delivering the summons and complaint to one Arthur Levey in New York City (R. 43). Levey was then a director of Limited and the President and a director of Scophony Corporation of America, a Delaware corporation (hereinafter referred to as "SCA") (R. 49, 50).

Service of process upon Limited was again attempted on April 5, 1946 by delivering the summons and complaint to one W. G. Elcock in his hotel in New York City (R. 44, 50). At that time Elcock was a director and a financial comptroller of Limited (R. 72). He had volunteered to come to this country on behalf of Limited for the purpose of trying to settle this anti-trust litigation and to resolve, if possible, the impasse in the internal affairs of SCA (R. 46). While in the United States the only things which he did on behalf of Limited were to attempt to adjust the differences between the stockholders of SCA and to dispose of Limited's stock interest in SCA (R. 47).

Neither on December 20, 1945, nor on April 5, 1946 (which, as aforesaid, are the dates of the attempted service of process) did Limited within the territorial limits of the United States:

(a) Maintain any office or agency or warehouses or other place of business;

(b) Own any real estate or other physical property;

(c) Have any employees;

(d) Employ any agents, other than counsel in this case and the aforesaid Elcock;

(e) Keep any telephone or telephone listing;

(f) Make any sales;

(g) Conduct any research; or

(h) Solicit any orders (R. 46, 47).

On December 20, 1945 and again on April 5, 1946, the only relations which Limited had with the United States were:

(1) *Limited's stock ownership in SCA* (R. 52). This consisted of 625 shares of the outstanding 1000 shares of the Class "A" stock of SCA, which class was entitled to elect three-fifths of the corporation's Board of Directors as well as its President, Vice President and Treasurer (R. 49, 50).

(2) *Limited's contractual relations with SCA under its agreement with SCA dated August 11, 1942* (R. 19-30). By this contract Limited divested itself through sale to SCA of all of its American and other Western Hemisphere patents relating to television, and it also sold to SCA the few pieces of equipment which it had in the United States (R. 21, 29). The consideration for this sale consisted of stock in SCA (R. 18), Fifteen Thousand Dollars in cash (R. 18), and certain undertakings in this contract on the part of SCA, including its agreement to pay to Limited a percentage of its net revenues derived from the sale or rental of the products or devices covered by the patents transferred by Limited to SCA (R. 24-25). Both Limited and SCA agreed to supply each other with technical data and information relating to these patents and to the television field generally (R. 22, 23). Limited also contracted not to make, use or sell within the Western Hemisphere any apparatus embodying any of the patents (R. 26) and SCA similarly agreed with regard to the Eastern Hemisphere (R. 26).

In the performance of its undertakings under this contract Limited was not called upon to perform any act within the United States. And indeed, it is not surprising that the Record shows none.

(3) *Activities in this country by certain representatives of Limited seeking to resolve the impasse in the internal affairs of SCA* (R. 56, 255). At the instigation of Limited, certain individuals made efforts from time to time to investigate and straighten out the difficulties of SCA. Levey, whom Limited had caused to be elected to SCA's Board of Directors, kept Limited advised of his disputes with some of the other directors of SCA (R. 54). To aid and assist Levey in his efforts to settle these disputes, Limited, in March 1945, engaged the services of James Lawrence Fly, an American attorney (R. 56). In or about March 1945, Limited requested Robert Boothby, an English member of Parliament who was then in the United States, to investigate the impasse in the affairs of SCA and to recommend how it might be overcome (R. 56). In or about July 1945, Limited requested Commander Arthur Mallet, an Englishman who was then in the United States, to investigate the difficulties of SCA (R. 56). Later, John Sloan, an American attorney, was retained by Limited to look into SCA's position and to report (R. 105).

The Record does not show that Levey was representing Limited in any way in the United States at the time of the attempted service upon him (December 20, 1945). Instead it affirmatively shows that at that time he was not authorized to transact any business on behalf of Limited in this country (R. 47). Furthermore, it should be noted that the irrevocable power of attorney which Limited gave Levey on March 26, 1945

(Gov't Brief, 15) was a proxy to vote Limited's stock in SCA and that this power had expired several months prior to the date of attempted service upon him (R. 247, 252). The Record shows only one power of attorney given by Limited to anyone in the United States during the latter part of 1945 and that was one given to James Lawrence Fly which empowered him to act in the negotiations which he was conducting on behalf of Limited with the owners of the "B" stock of SCA (R. 56).

At the time service was attempted upon Elcock (April 5, 1946) he was in the United States for the specific purposes pointed out above. His activities on behalf of Limited were restricted solely to protecting Limited's interest in SCA, either by resolving its internal difficulties or by disposing of Limited's stock in that corporation (R. 47).

Question Presented

Whether an alien corporation is found within a Federal judicial district so that jurisdiction over its person may be obtained in a civil anti-trust suit when the corporation's only relations with the district, and indeed with the United States, were at the times of purported service

(1) Stock ownership in an American corporation, to which the alien corporation has sold, more than three years previously, all its American and other Western Hemisphere patents, as well as equipment located in the United States;

(2) An agreement with the American corporation containing mutual undertakings but calling for no

acts to be performed within the United States by the alien corporation; and

(3) Activities on the part of individual agents engaged in protecting the interests of the alien corporation in the American company by seeking to resolve an impasse in the latter's internal affairs?

Summary of Argument

Valid service of process was not made upon Limited because at the times of attempted service Limited was not found in the Southern District of New York or elsewhere in the United States, that is to say, Limited was not doing business in that District or anywhere else in this country.

The service of process requirements contained in Section 12 of the Clayton Act are the same as those which existed at the time of its enactment and have not been changed by subsequent judicial decisions. To be "found" as the Congress used that term in Section 12 of the Clayton Act, a corporation on which service is attempted must be doing business in accordance with the generally accepted meaning of the term as defined by the courts at the time of the statutory enactment. These standards adopted by Congress cannot be changed by resort to *International Shoe Company* v. *Washington*, 326 U. S. 310, a recent decision relating to the validity of service of process generally.

Even if the standards for determining validity of service set forth in the *International Shoe Company* case, *supra*, could be applied in the instant case, service of process against Limited would fail because Limited's contacts, ties and relations with the Southern District of New York fall short of satisfying those standards.

ARGUMENT

POINT I

Scophony, Limited, was not amenable to the process of the New York District Court because at the times of attempted service Limited was not doing business in that District or elsewhere in the United States.

No personal judgment against a defendant can, of course, be valid unless the court which renders it has first obtained jurisdiction over the person of such defendant, and such jurisdiction must be secured through the actual service of process upon the defendant in accordance with due process of law or through his voluntary appearance in the action. *McDonald v. Mabee*, 243 U. S. 90, 91.

In applying this principle to corporate defendants, this Court has consistently held that if a foreign corporation is not carrying on business within the jurisdiction at the time of attempted service it is not amenable to the process of a court of that jurisdiction. *Cannon Mfg. Co.* v. *Cudahy Packing Co.*, 267 U. S. 333, 334; *Consolidated Textile Corp.* v. *Gregory*, 289 U. S. 85, 88.

In determining what constitutes doing business for purposes of jurisdiction, this Court has decided that the business done "must be of such nature and character as to warrant the inference that the corporation has subjected itself to the local jurisdiction, and is by its duly authorized officers or agents present within the State or district where service is attempted." *People's Tobacco Co.* v. *American Tobacco Co.*, 246 U. S. 79, 87.

An application of these established legal principles to the facts of this case shows that at the times of attempted service Limited was not subject to the jurisdiction of the

District Court because it was not doing any business within the Southern District of New York or any other Federal District. At these times Limited had no office, agency, warehouse or other place of business in the United States. It did not even have in this country a telephone or telephone listing. It did not own any real estate or physical property here. It had no employees; no orders were solicited on its behalf; no sales were made; and no research was conducted here (R. 46, 47).

As these facts are established beyond dispute, the Government puts forward (Gov't Brief, 22) for the first time in this case the novel theory that Limited was engaged at the times of attempted service of process in the business of the "exploitation and licensing of the Scophony Inventions by and to others, rather than itself manufacturing or selling products embodying those inventions."

This argument completely overlooks the fact that in 1942 the patents which the Government refers to as the "Scophony Patents" were sold and transferred by Limited to SCA (R. 21). Thereafter, Limited had no title to such patents. The Government's contention logically drives it to a disregard of the corporate entity of SCA. Such a conclusion is insupportable in law and in fact. As the Government refused (Gov't Brief, 18) to take the fatal step of arguing that the corporate veil be pierced, its contention regarding the business of patent exploitation by Limited must of necessity collapse.

The Government also argues that Limited undertook the exploitation of those inventions in partnership with General Precision Equipment Corporation and Television Productions, Inc. and that the medium through which the partnership exploited patents was their corporate instrumentality, SCA, controlled through their respective shareholdings (Gov't Brief, 25-27). This argument to have force

must shatter the corporate entity of SCA. And here again the Government is unwilling and unable to carry its argument to its logical conclusion.

If jurisdiction is to be found in this case, it must rest upon one or more of the following bases:

(1) Limited's stock ownership in SCA;

(2) Limited's contractual relations with SCA under its Agreement with SCA, dated August 11, 1942; or

(3) Activities in this country by certain representatives of Limited seeking to resolve the impasse in the internal affairs of SCA.

These, at the times of purported service, were Limited's sole relations with the New York district and, indeed, with the United States. Under the authorities they are not sufficient to constitute a basis for jurisdiction.

(1) *Limited's stock ownership in SCA.* During 1945 and 1946, Limited owned 625 shares of SCA's Class "A" stock. Although such shareholdings gave Limited the right to elect three-fifths of SCA's Board of Directors as well as its President, Vice President and Treasurer, there is nothing in the Record to show that Limited at all times has treated SCA other than as a distinct corporate entity.

The Government concedes (Gov't Brief, 35) that by the time this proceeding was instituted and service attempted, SCA "was in actual fact not then acting as Limited's agent." As this Court held in *People's Tobacco Co.* v. *American Tobacco Co., supra,* 87, "The fact that the company owned stock in the local subsidiary companies did not bring it into the State in the sense of transacting its own business there." See also, *Cannon Mfg. Co.* v. *Cudahy Packing Co.,*

supra, 334; *Consolidated Textile Corp.* v. *Gregory*, *supra*, 88.*

(2) *Limited's contractual relations with SCA under its agreement with SCA, dated August 11, 1942.* This was the only executory agreement relating to the United States to which Limited was a party at the times of attempted service. It was not a party to the other contract of even date (R. 30-43). The parties signatory to that agreement were SCA, General Precision Equipment Corporation and Television Productions, Inc. The Agreement of July 31, 1942, to which Limited, General Precision Equipment Corporation and Television Productions, Inc. were parties (R. 14-18), (characterized by the Government as the "Master Agreement" [Gov't Brief, 7]) had been fully performed by the parties thereto more than three years before the times of purported service. In this connection it should be pointed out that the Government is in error in referring to "the execution by Limited of the Master Agreement of July 31st and of the two attached implementing agreements" (Gov't Brief, 27). The fact is that Limited, as pointed out above, executed only one and not both of the so-called implementing agreements.

The Agreement of August 11, 1942 between Limited and SCA imposes no contractual obligation upon Limited to do anything within the territorial boundaries of the United States. And proof is wholly lacking of any acts by Limited in this Country pursuant to this Agreement after 1942. The Government relies on the provisions of the Agreement

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* Two cases [*Dobson* v. *Farbenfabriken*, 208 Fed. 125 (E. D. Pa., 1913); *U. S.* v. *U. S. Alkali Export Asn.*, unreported (S. D. N. Y., July 16, 1946) (Gov't Brief, 30, 31)] are clearly inapplicable. Both involved situations where an alien corporation had treated its American subsidiary as its agent in the United States.

(1) pertaining to the transmission and exchange of information relating to the use of the television inventions (Gov't Brief, 26), and (2) pertaining to payments by SCA to Limited, or by Limited to SCA, in connection with the sale or rental by either of them (or their respective licensees) of products or devices covered by their respective television patents (Gov't Brief, 26). The Record does not show the transmission of funds pursuant to these provisions either by SCA or by Limited. With regard to the exchange of information relating to the use of the television inventions, mailings by Limited from England could not be deemed to be acts of doing business in the United States. With regard to the transmission of funds pursuant to the provisions of this contract, the Record does not show that this was done either by SCA or by Limited, but even if Limited had transmitted funds from Great Britain to the United States, this could hardly be considered as making Limited present in the United States.*

(3) *Activities in this country of certain representatives of Limited.* This point, urged by the Government, is not well taken because, as the District Court pointed out (R. 62), such activities were not concerned with the ordinary business of Limited which was the manufacture and sale of television apparatus. The efforts of these representatives were directed towards the solution of the difficulties besetting SCA, and they were thus engaged as the District

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* Rosenthal's shift of employment from Limited to SCA appears to be one of the trivia to which the Government clings (Gov't Brief, 33), but can scarcely be related to Limited's doing business in the United States. To the assertion that on several occasions SCA at Limited's request obtained material and equipment in the United States for shipment to Limited in England, the Court below held that this was not a frequent and common practice of SCA (R. 62), and furthermore the Record does not show that any such purchase or shipment took place on or about the times of attempted service.

Court found (R. 62) in protecting the interests of Limited in SCA.

Until March 1945, Limited relied almost wholly upon Levey to keep it informed of SCA's difficulties and looked to him to protect Limited's interests by finding a solution for them. In March 1945, James Lawrence Fly, an attorney in the United States, was retained by Limited and the other Class "A" shareholders of SCA to represent them in the controversy which had arisen with the Class "B" stockholders (R. 56). By power of attorney dated September 30, 1945, Fly was empowered to act on behalf of Limited in the negotiations that he was conducting with the owners of the "B" stock of SCA (R. 56).

Three other persons were requested by Limited to investigate and report on SCA's condition and the impasse which had brought about SCA's difficulties: In March 1945, Robert Boothby, an English member of Parliament who was then visiting the United States (R. 56); in July 1945, Commander Arthur Mallet, an Englishman temporarily in this country (R. 56); and in 1946, John Sloan, of the New York Bar (R. 105).

Finally, in March 1946, W. G. Elcock, a director and a financial comptroller of Limited, came to this country for the purpose of settling this anti-trust litigation and also in order to resolve the impasse in the internal affairs of SCA (R. 46). While here the only things he did were to attempt an adjustment of the differences between the stockholders of SCA and to endeavor to sell Limited's stock interest in SCA (R. 47).

In accordance with well-established principles of law, these activities in this country by such representatives of Limited did not subject that corporation to the jurisdiction of the District Court. In *Jefroy Silks, Inc.* v. *Papeteries Navarre*, 68 F. (2d) 707 (C. C. A. 2nd, 1934),

the defendant, a French corporation, had sent its representative, one Dukers, to New York to sell its product. He made some sales and then returned to France after the venture proved unsuccessful. Service of process was attempted on an individual by the name of Batchelor who was designated by the defendant as its representative. The Circuit Court of Appeals for the Second Circuit affirmed the order vacating the service, and stated, at page 708:

> "Without a place of business in New York, without being engaged regularly in carrying on business there, and without any license to do business there, it cannot be inferred that this French corporation was within the jurisdiction simply because Batchelor was acting for it in the attempt to adjust a few accounts left over from the transactions of Dukers. He was its representative only for that limited purpose and was the corporation in New York in no other capacity. Davega, Inc. v. Lincoln Furniture Mfg. Co., Inc., (C. C. A.) 29 F. (2d) 164; Rosenberg Bros. & Co., Inc. v. Curtis Brown Co., 260 U. S. 516, 43 S. Ct. 170, 67 L. Ed. 372; Philadelphia & Reading Ry. Co. v. McKibbin, 243 U. S. 264, 37 S. Ct. 280, 61 L. Ed. 710; People's Tobacco Co. v. American Tobacco Co., 246 U. S. 79, 38 S. Ct. 233, 62 L. Ed. 587, Ann. Cas. 1918C, 537."

The Government states as a proposition that

> "A foreign corporation's involvement in disputes and, negotiations for their settlement, such as these, have long been recognized by the courts as a basis for deciding that the foreign corporation was 'found' within the jurisdiction so that it could properly be sued and served with process therein." (Gov't Brief, 37.)

The cases cited in support of this statement are inapplicable to the instant case and, indeed, do not even support the statement as made. *Hutchinson* v. *Chase & Gilbert, Inc.*, 45 F. (2d) 139 (C. C. A. 2nd, 1930) involved the effectiveness of service of process upon an officer of a Massachusetts corporation who was temporarily within the Southern District. The Court held that the Massachusetts corporation was not subject to the process of the Federal court for that district. In his opinion for the court, Judge Learned Hand said, at page 142:

> "In the case at bar, the defendant has never done any continuous business in New York. It has come here on occasion, when it found likely opportunities to buy control in a company which would fit in with its general plans."

St. Louis S. W. Ry. Co. of Texas v. *Alexander*, 227 U. S. 218, mentioned in the *Hutchinson* case, *supra*, 142, is not in point. The parent and subsidiary railroad companies had a joint office in New York and employed a freight agent there who was authorized to handle claims against both companies. A shipper over the lines of the subsidiary recovered judgment against that company for damage to goods shipped by him. The agent undertook to act for and represent the subsidiary, negotiate for it and in its behalf declined to adjust the claim in question. The ordinary business of the corporation for which the agent was maintained was, in part, the settlement of disputes. That, obviously, is not the case here.

In *Geo. Wm. Bentley Co.* v. *Chivers & Sons, Ltd.*, 215 Fed. 959 (S. D. N. Y., 1913), the real question before the Court was whether or not a proper representative of the company was served with process. There was little question of the

fact that the company was doing business in New York, for the Court said, at page 960:

> "That Chivers & Sons, Limited, was doing business in the state of New York through its agent, the plaintiff, can hardly be disputed."

The plaintiff had a ten year contract conferring upon him the exclusive right to sell the products of the defendant.

The two insurance cases, *Mutual Life Insurance Co.* v. *Spratley*, 172 U. S. 602; *Pennsylvania Lumbermen's Mutual Fire Ins. Co.* v. *Meyer*, 197 U. S. 407, are not cognate authorities. In each, an insurance company had a large number of policies outstanding in the jurisdiction involved. This Court recognized that the very nature of an insurance business involved the payment and settlement of claims and that negotiations to that end by insurance adjusters were part and parcel of the ordinary business of an insurance company.

POINT II

The service of process requirements contained in Section 12 of the Clayton Act are the same as those which existed at the time of its enactment and are not changed by any subsequent judicial decision relating to the validity of service of process generally.

The jurisdiction of federal courts in anti-trust suits against corporations is governed by Section 12 of the Clayton Act, which was enacted in 1914 and which reads as follows:

> "Any suit, action, or proceeding under the antitrust laws against a corporation may be brought not only in

the judicial district whereof it is an inhabitant, but also in any district wherein it may be found or transacts business; and all process in such cases may be served in the district of which it is an inhabitant, or wherever it may be found." (38 Stat. §736, 15 U. S. C. §22).*

It will be noted that this statute divides into two parts. The first is a venue provision, and the second is a provision dealing with the service of process. Prior to the enactment of this legislation, anti-trust suits against corporations could be brought only in the judicial districts where such corporations were incorporated or were "found". The purpose of this statute was to liberalize from the Government's point of view the rule as to venue and to permit an anti-trust suit to be brought against a corporation not only, as theretofore, in the judicial district where it was incorporated or "found," but also in any district where it might be merely transacting business, provided, however, that in that event service was actually effected either in the district of incorporation or in a district in which it was "found". *Eastman Kodak Co.* v. *Southern Photo Materials Co.*, 273 U. S. 359, 372-373.

A foreign corporation may "transact business" in the usual understanding of these words but may still not be "found" in the judicial district where its business was

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* The Government has suggested in a footnote on page 39 of its Brief that Section 12 of the Clayton Act may not apply to alien corporations, but it does not press the point. This reticence is understandable because of the absence of any authority directly supporting such a contention. No reason suggests itself why Congress would enact a statute which was intended, from the Government's viewpoint, to liberalize the former rules governing venue in anti-trust litigation only in so far as suits against domestic corporations were concerned and would at the same time keep in force the more stringent rule with respect to alien corporations. No such incongruous result could have been intended.

transacted. To establish venue a plaintiff need only show that suit has been brought in a district in which the defendant corporation is transacting business. This was set forth in *Eastman Kodak Co.* v. *Southern Photo Materials Co., supra,* in which this Court stated, at page 374:

> "To construe the words 'or transacts business' as adding nothing of substance to the meaning of the words 'or is found,' as used in the Anti-Trust Act, and as still requiring that the suit be brought in a district in which the corporation resides or is 'found,' would to that extent defeat the plain purpose of this section and leave no occasion for the provision that the process might be served in a district in which the corporation resides or is found. And we find nothing in the legislative proceedings leading to its enactment which requires or justifies such a construction."

The authorities establish the principle that to be "found," as the Congress used that term in this Section of the Clayton Act, the corporation on which service is attempted must be "doing business" in accordance with the generally accepted meaning of that term as defined by the courts at the time of this statutory enactment. *Green* v. *Chicago, Burlington & Quincy Ry.*, 205 U. S. 530; *People's Tobacco Co.* v. *American Tobacco Co., supra.*

In *Haskell* v. *Aluminum Co. of America,* 14 F. (2d) 864, (D. Mass., 1926), the Court stated, at page 867:

> "It seems to be too firmly established to admit of argument that in statutes affecting venue the word 'found' has been given a definite legal significance when applied to foreign corporations, and it will be presumed that, when Congress enacted the Clayton

Act, it used the word as defined by the courts. Standard Oil Co. v. United States, 221 U. S. 1 at 59 • • • •"

The Government contends in Point II of its Brief, at pages 38-47, that *International Shoe Company* v. *Washington*, 326 U. S. 310, has established new standards for determining the validity of service of process upon a corporation. The Government further contends that these standards apply to service of process in an anti-trust suit brought under Section 12 of the Clayton Act.

This argument is untenable. Section 12 of the Clayton Act has its own standards for determining validity of service of process. These were set at the time of Congressional enactment by incorporating in the statute, through the use of the word "found," the legal concepts of doing business which the courts had then formulated. The standards thus adopted by Congress in this statute cannot be changed by resort to a subsequent court decision relating to the validity of service of process generally.

• • • • •

Even if the standards for determining the validity of service set forth in the *International Shoe Company* case, *supra*, could be applied in the instant case, service of process against Limited would fail because Limited's contacts, ties and relations with the Southern District of New York fall short of satisfying those standards.

One of the indispensible standards set by the decision of this Court in the *International Shoe Company* case was the requirement that a foreign corporation could be validly reached by process only if it was at that time conducting activities within the jurisdictional limits of the court. An additional standard was that such activities should be neither sporadic nor casual.

As shown in Point I of this Brief (see *supra*, pp. 10-16), Limited was not engaged in activities in the Southern Dis-

trict of New York of the type which would satisfy the standards established in the *International Shoe Company* case. Limited was not conducting activities of a business nature in the Southern District of New York, unless the activities of its representatives seeking to resolve the internal difficulties of SCA could be so considered. But even then these activities were sporadic and do not satisfy the test of "presence" discussed by Mr. Chief Justice Stone, at page 317:

> "• • • • it has been generally recognized that the casual presence of the corporate agent or even his conduct of single or isolated items of activities in a state in the corporation's behalf are not enough to subject it to suit on causes of action unconnected with the activities there. *St. Clair* v. *Cox, supra,* 359, 360; *Old Wayne Life Assn.* v. *McDonough,* 204 U. S. 8, 21; *Frene* v. *Louisville Cement Co., supra,* 515, and cases cited. To require the corporation in such circumstances to defend the suit away from its home or other jurisdiction where it carries on more substantial activities has been thought to lay too great and unreasonable a burden on the corporation to comport with due process."

CONCLUSION

It is therefore respectfully submitted that the judgment of the United States District Court for the Southern District of New York was correct and should be affirmed.

Respectfully submitted,

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SUPREME COURT OF THE UNITED STATES

No. 41.—October Term, 1947.

The United States of America, Appellant, v. Scophony Corporation of America, General Precision Equipment Corporation, Television Productions, Inc., Paramount Pictures, Inc., Scophony Limited, et al.	Appeal from the District Court of the United States for the Southern District of New York.

[April 26, 1948.]

Mr. Justice Rutledge delivered the opinion of the Court.

The appellee Scophony, Limited is a British corporation which has its offices and principal place of business in London, England. The question is whether that company "transacted business" and was "found" within the Southern District of New York under § 12 of the Clayton Act,[1] so that it could be sued and served there in a civil proceeding charging violation of §§ 1 and 2 of the Sherman Act. 26 Stat. 209, 50 Stat. 693, 15 U. S. C. §§ 1, 2. The violations stated were that Scophony and the other defendants[2] had monopolized, attempted to monopolize,

[1] "Sec. 12. That any suit, action, or proceeding under the antitrust laws against a corporation may be brought not only in the judicial district whereof it is an inhabitant, but also in any district wherein it may be found or transacts business; and all process in such cases may be served in the district of which it is an inhabitant, or wherever it may be found." 38 Stat. 736, 15 U. S. C. § 22.

[2] The suit was instituted against Scophony, Limited (designated in this opinion as "Scophony"), Scophony Corporation of America (designated "American Scophony"), General Precision Equipment Corporation (designated "General Precision"), Television Produc-

and conspired to restrain and monopolize interstate and foreign commerce in products, patents and inventions useful in television and allied industries. The cause is here on direct appeal [3] from an order of the District Court granting Scophony's motion to quash the service of process and dismiss the complaint as to it. 69 F. Supp. 666.

Scophony manufactures and sells television apparatus and is the owner and licensor of inventions and patents covering television reception and transmission.[4] With the outbreak of the European War in 1939, the British Broadcasting Corporation stopped television broadcasting. Consequently it became impossible for Scophony to continue in the commercial development, manufacture and sale of television equipment in England. It therefore sent personnel to the United States, opened an office in New York City, and began demonstrations of its product and other activities preliminary to establishing a manufacturing and selling business in this country.

Late in 1941 Scophony found itself in financial distress, in part because of restrictions imposed by the British Government on the export of currency. It became imperative that new capital from American sources be found

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tions, Inc. (designated "Productions"), Paramount Pictures, Inc. (designated "Paramount"), and three individual defendants, Arthur Levey and the presidents of General Precision and Productions. The corporations, except Scophony, are incorporated in the United States.

[3] Pursuant to § 2 of the Expediting Act of February 11, 1903, 32 Stat. 823, 15 U. S. C. § 29, and § 238 of the Judicial Code, 43 Stat. 938, 28 U. S. C. § 345.

[4] The inventions and patents in the main relate to two systems of television transmission and reception, one known as the "supersonic" system and the other as the "skiatron" system. We shall at times refer to the present and future patents, processes, designs, technical data, etc., relating to these two systems as the Scophony inventions.

A third system, the cathode-fluorescent system, was developed early in this century and is the principal method of television transmission and reception used in the United States today.

for the enterprise. Accordingly, Arthur Levey, a director of Scophony and one of its founders, undertook negotiations in New York with American motion picture and television interests, including Paramount and General Precision. They culminated in the execution of three interlacing contracts, the so-called master agreement of July 31, 1942, and two supplemental agreements of August 11, 1942. Copies of the latter had been attached to the master agreement, which provided for their later execution, and they when executed in effect carried out its terms. The alleged violations of the Sherman Act center around these agreements.

The master agreement was executed by Scophony, William George Elcoek, as mortgagee of all of Scophony's assets, General Precision, and Productions, the latter a wholly owned subsidiary of Paramount. It provided for the formation of a new Delaware corporation, American Scophony, with an authorized capital stock of 1,000 Class "A" shares and a like number of Class "B" shares. Scophony and individuals interested in it [5] were to be given the Class "A" shares. Under the agreement, ownership of those shares conferred the right to elect three of American Scophony's five directors and its president, vice president and treasurer. The Class "B" shares were allotted to General Precision and Productions. By virtue of such ownership those two corporations were entitled to name the remaining two directors and the secretary and assistant secretary of American Scophony. Levey was named in the agreement as the president and a director of the new corporation.

The master agreement set forth the general desire of the parties to promote the utilization of the Scophony inventions "particularly in the United States of America

[5] An agreement of February 4, 1943, amended the original agreement so as to give two-thirds of the "A" shares to Scophony, the remainder to individuals.

and generally in the Western Hemisphere." It then stated that American Scophony had been organized "as a means therefor." Scophony agreed to transfer all its television equipment then in the United States to American Scophony and to enter into the first supplemental agreement. Scophony, with the other parties, also undertook to cause American Scophony to enter into both supplemental agreements. For the "B" stock in American Scophony and other rights acquired, General Precision and Productions agreed to enter into the second supplemental agreement and to pay specified sums in cash to Scophony or for its benefit in liquidation of listed obligations.

Pursuant to the master agreement's terms, the first supplemental agreement was executed by Scophony, Elcock, as mortgagee of its assets, and American Scophony; the other, by American Scophony, General Precision, and Productions. For present purposes it is necessary to set forth only the general effect of the agreements taken together. Scophony transferred to American Scophony not only all of its equipment in the United States, but also all patents and other interests in the Scophony inventions within the Western Hemisphere. General Precision and Productions were granted exclusive licenses under American Scophony's patents. They agreed to pay royalties on the products produced under the licenses and American Scophony undertook to transmit fifty per cent of such royalties to Scophony. American Scophony gave Scophony an exclusive sublicense for the Eastern Hemisphere on a royalty basis under all patents licensed to American Scophony by General Precision and Productions. Provision was also made for the interchange of technical data and information respecting the Scophony inventions. Finally, it was agreed that Scophony would not market any product involving the Scophony inventions in the Western Hemisphere and that General Pre-

cision and Productions would not export any such product to the Eastern Hemisphere.[6]

This rather complex plan soon fell of its own weight. Starting in 1943, an impasse developed in the affairs of American Scophony. It stemmed from the failure and unwillingness of General Precision and Productions to exploit the Scophony inventions themselves and their refusal to modify the agreements to permit the licensing of other American firms under the inventions. Several manufacturers expressed an interest in obtaining licenses. But in each instance the directors representing the American interests holding the Class "B" shares were unwilling to approve the necessary modifications in the existing arrangements. In July, 1945, the directors representing the "B" interests resigned. This made it impossible for American Scophony to transact business, since charter and by-law provisions adopted pursuant to the master and supplemental agreements required the presence of at least one Class "B" director for a quorum. Adding to the difficulties were American Scophony's shortage of funds and the apparent reluctance of the American interests to cooperate in efforts to place American Scophony on firmer financial footing. American Scophony's affairs were further complicated by the institution of the present antitrust proceeding on December 18, 1945.

Levey kept Scophony advised of developments in the dispute between the "A" and "B" factions and otherwise

[6] The complaint alleged that the effects of the agreements and understandings were to create a territorial division of the manufacture and sale of television products, assigning the Eastern Hemisphere to Scophony and the Western Hemisphere to General Precision and Productions; to suppress and restrain competition in the manufacture and sale of television equipment, both in the domestic and in the export markets; and to give General Precision and Productions monopoly power over the Scophony inventions which enabled them to suppress their exploitation and deprive others of their use.

made progress reports to Scophony on its interests in the United States. As the impasse heightened, other individuals were authorized by Scophony to act in its behalf in the United States.[7] Service of process as to Scophony was made first on Levey in New York City on December 20, 1945.[8]

On April 5, 1946, a summons and a copy of the complaint directed to Scophony were also served on Elcock in New York City. He was a dominant figure in Scophony. He arrived in this country in March, 1946, with the mission of investigating and ending the impasse and disposing of Scophony's interest in American Scophony. Elcock not only was mortgagee of Scophony's assets by virtue of having made a large loan to the company. He was also its financial comptroller and a member of its board. At the time of service on him, he held a comprehensive power of attorney, irrevocable until March, 1947, giving him complete power to act with regard to Scophony's interests in the United States, including those in American Scophony.[9]

The District Court, in granting the motion to quash service and dismiss the complaint as to Scophony, held

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[7] These included at various times two American attorneys, a member of the British Parliament, and an English officer.

[8] Levey immediately informed Scophony in England of this action and advised it to designate appropriate counsel. On December 21, 1945, he sent a copy of the complaint to Scophony by airmail.

[9] The power of attorney set forth Scophony's desire to appoint Elcock to act "and bind the Company in all or any matters affecting the Company's interests in the United States . . . ." It then authorized Elcock to institute and prosecute all proceedings necessary to conserve Scophony's interests; to defend or compromise any suits brought against Scophony; to settle accounts; to engage or dismiss subagents; to borrow money; to dispose of any and all of Scophony's property and interests in the United States; and "generally to represent the Company in the United States of America in all matters in any way affecting or pertaining to the Company . . . ."

that it was not "found" in the Southern District of New York within the meaning of § 12. The court rejected the contention that Scophony was within the jurisdiction by reason of the activities of its agents. It concluded that none of those activities related to Scophony's ordinary business of manufacturing, selling and licensing television apparatus, but all were confined to protecting Scophony's interest in American Scophony. It also found that the conduct of American Scophony did not serve to bring Scophony within the jurisdiction. 69 F. Supp. 666.

I.

Section 12 of the Clayton Act has two functions, first, to fix the venue for antitrust suits against corporations; second, to determine where process in such suits may be served. Venue may be had "not only in the judicial district whereof it is an inhabitant, but also in any district wherein it may be found *or transacts business.*" And all process may be served "in the district of which it is an inhabitant, or wherever it may be found." (Emphasis added.)

A plain and literal reading of the section's words gives it deceptively simple appearance. The source of trouble lies in the use of verbs descriptive of the behavior of human beings to describe that of entities characterized by Chief Justice Marshall as "artificial . . . , invisible, intangible, and existing only in contemplation of law." *Dartmouth College* v. *Woodward*, 4 Wheat. 518, 636.[10]

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[10] More than once Marshall had difficulty in transferring to corporations or other institutions legal conceptions and relations shaped in nomenclature and in fact from normative evolution in relation to persons of flesh and blood.

See, *e. g.*, *Bank* v. *Deveaux*, 5 Cranch 61, where he was unable to adapt the concept of corporate "inhabitancy," applied in decisions he cited, for fitting the corporation into the constitutional scheme of

The process of translating group or institutional relations in terms of individual ones, and so keeping them distinct from the nongroup relations of the people whose group rights are thus integrated, is perennial, not only because the law's norm is so much the individual man, but also because the continuing evolution of institutions more and more compels fitting them into individualistically conceived legal patterns. Perhaps in no other field have the vagaries of this process been exemplified more or more often than in the determination of matters of jurisdiction, venue and liability to service of process in our federal system.[11] It has gone on from *Bank* v. *Deveaux*, 5 Cranch 61, and *Baptist Association* v. *Hart's Executors*, 4 Wheat. 1, to *International Shoe Co.* v. *Washington*, 326 U. S. 310, and now this case.[12]

The translation, or rather the necessity for it, permeates every significant word of § 12, not wholly excluding "or transacts business." If the statutory slate were clean, one might readily conclude that the words "inhabitant" and "found" would have the same meaning for locating both

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diversity jurisdiction. His individualistic solution brought difficulties which lasted for decades. See Henderson, The Position of Foreign Corporations in American Constitutional Law 50–76; Harris, A Corporation As a Citizen, 1 Va. L. Rev. 507. Cf. *Baptist Association* v. *Hart's Executors*, 4 Wheat. 1.

[11] See, *e. g.*, Cahill, Jurisdiction over Foreign Corporations and Individuals Who Carry on Business within the Territory, 30 Harv. L. Rev. 676; Scott, Jurisdiction over Nonresidents Doing Business within a State, 32 Harv. L. Rev. 871; Bullington, Jurisdiction over Foreign Corporations, 6 N. C. L. Rev. 147; Note, What Constitutes Doing Business by a Foreign Corporation for Purposes of Jurisdiction, 29 Col. L. Rev. 187.

[12] The very federalism of our structure magnifies the problem, by multiplying state and other governmental boundaries across which corporate activity runs with the greatest freedom. The problem arises on constitutional as well as statutory and common-law levels. Cf. *International Shoe Co.* v. *Washington*, 326 U. S. 310; *Puerto Rico* v. *Russell & Co.*, 288 U. S. 476.

venue and the proper place for serving process. But even so, each of those terms and indeed the term "transacts business" would have to be given specific content actually descriptive of corporate events taking place within specified areas. Because all corporate action must be vicarious, that content could be determined only by an act of judgment which selects and attributes to the corporation, from the mass of activity done or purporting to be done on its behalf, those acts of individuals which are relevant for the particular statutory purposes and policies in hand.

The statutory slate, however, is neither entirely new nor clean. Both legislative and judicial hands have written upon it. The writing is meandering, unclear in part, and partly erased. But it cannot be disregarded. What is legible must furnish guidance to decision. We deal here with a problem of statutory construction, not one of constitutional import.[13] Nor do we have any question of the exercise of Congress' power to its farthest limit. The issue is simply how far Congress meant to go, and specifically whether it intended to create venue and liability to service of process through the occurrence within a district of the kinds of acts done here on Scophony's behalf.

Section 12 of the Clayton Act is an enlargement of § 7 of the Sherman Anti-Trust Act. *Eastman Co.* v. *Southern Photo Co.*, 273 U. S. 359. The earlier statute

[13] Appellee makes no suggestion of a constitutional issue. The Government, however, suggests that, in view of our recent decision in *International Shoe Co.* v. *Washington*, 326 U. S. 310, which was concerned with the jurisdiction of a state over a foreign corporation for purposes of suit and service of process, and in view of aspects of similarity between that problem and the one now presented, we extend to this case and to § 12 the criteria there formulated and applied. There is no necessity for doing so. The facts of the two cases are considerably different and, as we have said, we are not concerned here with finding the utmost reach of Congress' power.

provided for suit in the district in which the defendant "resides or is found." 26 Stat. 210. That wording controlled for both venue and fixing the places for service of process.

We do not stop to review the decisions construing § 7 and similar statutes, cf. *Suttle* v. *Reich Bros.*, 333 U. S. 163; see *International Shoe Co.* v. *Washington*, *supra*, at 317–319, except to refer to *People's Tobacco Co.* v. *American Tobacco Co.*, 246 U. S. 79. There the foreign corporation was sued in a district in which it did not "reside." Because the Court found that the company had withdrawn from the state in which the district was located and had revoked the authority of its principal agents there, it held that the defendant was not "found" in the district, although certain corporate activities continued.

The conventional rationalization applied equated "found" in sequence to "presence," to "doing business by its agents there," to "of a character warranting inference of subjection to the local jurisdiction." [14] The facts that the company continued to advertise its goods in the state and district, to make interstate sales to jobbers there, to send in drummers who solicited retail orders to be turned over to the jobbers, and finally to own stock in local subsidiaries, were held not to constitute the sort of "doing business" warranting the inference of subjection to the local jurisdiction for the statute's purposes. *International Harvester* v. *Kentucky*, 234 U. S. 579, was narrowly distinguished. 246 U. S. at 87.

[14] The Court said: "The general rule deducible from all our decisions is that the business must be of such nature and character as to warrant the inference that the corporation has subjected itself to the local jurisdiction, and is by its duly authorized officers or agents present within the State or district where service is attempted. *Philadelphia & Reading Ry. Co.* v. *McKibbin*, 243 U. S. 264; *St. Louis Southwestern Ry. Co.* v. *Alexander*, 227 U. S. 218, 226." 246 U. S. 79, 87.

The suit in the *People's Tobacco* case was begun in 1912, but the decision was not rendered until 1918. Meanwhile, in 1914, Congress had enacted the Clayton Act, including § 12. The following year the *Eastman* case, *supra*, was begun in the Northern District of Georgia. Process issued and was served under § 12 on the defendant, a New York corporation, at its principal place of business in Rochester. In 1927 this Court sustained both the venue and the service, as against objections that § 12 had not broadened § 7 of the Sherman Act, but merely made explicit what had been decided under it.[15]

The argument was certainly plausible, but for the fact that it made the addition of "or transacts business" to "inhabitant" and "found" in § 12 redundant and meaningless. The Court refused to accept the argument, because doing so would have defeated the plain remedial purpose of § 12.[16] That section was enacted, it held, to enlarge the jurisdiction given by § 7 of the Sherman Act over corporations by adding those words, "so as to estab-

[15] Counsel for the defendant equated the words "inhabitant" and "found" of § 12 to "resides or is found" of § 7 of the Sherman Act. They then went on to argue that the addition of "or transacts business" in the venue clause of § 12 did not broaden the section, but merely made explicit what the Court had already decided under the earlier statute. 273 U. S. at 361. This, because "or transacts business" was said to be nothing more than "carrying on business," which was the content the Court had given to "is found" in § 7, by the *People's Tobacco* case and others.

[16] Rather, the Court said, the section supplements "the remedial provision of the Anti-Trust Act for the redress of injuries resulting from illegal restraints upon interstate trade, by relieving the injured person from the necessity of resorting for the redress of wrongs committed by a non-resident corporation, to a district, however distant, in which it resides or may be 'found'—often an insuperable obstacle—and enabling him to institute the suit in a district, frequently that of his own residence, in which the corporation *in fact* transacts business, and bring it before the court by the service of process in a district in which it resides or may be 'found.'" 273 U. S. 359, 373. (Emphasis added.)

lish the venue of such a suit not only as theretofore in a district in which the corporation resides or is 'found,' but also in any district in which it 'transacts business'—although neither residing nor 'found' therein—in which case the process may be issued to and served in a district in which the corporation either resides or is 'found.'" 273 U. S. at 372.[17]

This construction gave the words "transacts business" a much broader meaning for establishing venue than the concept of "carrying on business" denoted by "found" under the preexisting statute and decisions. The scope of the addition was indicated by the statement "that a corporation is engaged in transacting business in a district . . . if *in fact, in the ordinary and usual sense*, it 'transacts business' therein *of any substantial character*." *Id.* at 373. (Emphasis added.)

In other words, for venue purposes, the Court sloughed off the highly technical distinctions theretofore glossed upon "found" for filling that term with particularized meaning, or emptying it, under the translation of "carrying on business." In their stead it substituted the practical and broader business conception of engaging in any substantial business operations. Cf. *Frene* v. *Louisville Cement Co.*, 134 F. 2d 511; *International Shoe Co.* v. *Washington*, *supra*. Refinements such as previously were made under the "mere solicitation" and "solicitation plus" criteria, cf. *Frene* v. *Louisville Cement Co.*, *supra*, and like those drawn, *e. g.*, between the *People's Tobacco* and *International Harvester* cases, *supra*, were no longer determinative. The practical, everyday business or commercial concept of doing or carrying on business "of any substantial character" became the test of venue.

Applying it, the Court stated that "manifestly" the Eastman Company was not "present" in the Georgia district under the earlier tests of § 7 of the Sherman Act,

[17] See also note 16.

either for the purpose of venue or as being amenable to service of process. P. 371. It thus aligned the case under those tests with the *People's Tobacco* decision rather than the *International Harvester* one. But, under the broader room given by § 12, venue was held to have been established.[18]

Thus, by substituting practical, business conceptions for the previous hair-splitting legal technicalities encrusted upon the "found"-"present"-"carrying-on-business" sequence, the Court yielded to and made effective Congress' remedial purpose. Thereby it relieved persons injured through corporate violations of the antitrust laws from the "often insuperable obstacle" of resorting to distant forums for redress of wrongs done in the places of their business or residence. A foreign corporation no longer could come to a district, perpetrate there the injuries outlawed, and then by retreating or even without retreating[19] to its headquarters defeat or delay the retribution due.

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[18] The concrete facts held to sustain the venue were that the Eastman Company was engaged "not only in selling and shipping its goods to dealers within the Georgia district, but also in soliciting orders therein through its salesmen and promoting the demand for its goods through its demonstrators for the purpose of increasing its sales . . . ." 273 U. S. at 374.

The Court also expressly stated that, in contrast to prior limitations, the company was "none the less engaged in transacting business . . . because of the fact that such business may be entirely interstate in character and be transacted by agents who do not reside within the district," referring in this connection to *International Harvester* v. *Kentucky*, 234 U. S. 579, 587, and *Davis* v. *Farmers Co-operative Co.*, 262 U. S. 312, 316. 273 U. S. 359, 373.

[19] *I. e.*, by artful arrangement of agents' authority, or of their comings and goings, or of the geography of minute incidents in contracting. Cf. *People's Tobacco Co.* v. *American Tobacco Co.*, 246 U. S. 79. Such artifice saw its day end for creating substantive liability through a course of dealing contrary to the antitrust statutes, but without thereby also creating venue to enforce it, with the advent of § 12.

With venue established under the new and broader approach, the *Eastman* case presented no problem regarding the service of process, except possibly for the ruling that process might run to another district than the one in which suit was brought. 273 U. S. at 374. For by whatever test, whether of the old § 7 or the new § 12, the service was good. As we have noted, the process had been directed to and served in the district where the Eastman Company was an "inhabitant."[20] There was therefore no necessity for ruling upon the meaning of "found" as relating to any other district. Any such ruling necessarily could be no more than dictum, since no such issue was presented by the facts.

Nevertheless, for service of process § 12 had specified "the district of which it is an inhabitant, or wherever it may be found" without adding "or transacts business," as was done in the venue clause. Accordingly the Court took account of this difference and went on to indicate that for purposes of liability to service the section merely carried forward the preexisting law, so that in some situations service in a district would not be valid, even though venue were clearly established under § 12.[21]

But regardless of the pronouncement's effect, the decision, by resolving the venue problem, substantially removed the serious obstacles and practical immunities to

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[20] As has been stated, the company was incorporated in New York and had its principal office and place of business in Rochester.

[21] Although difference of that sort may appear to be generally incongruous, since ordinarily it would seem that susceptibility to suit in a district should be accompanied by amenability to process there, such things of course are for Congress' determination as matters of policy relating to the scope and correlation, or lack of it, of venue and service provisions. There is certainly no constitutional requirement that the two be coextensive. And to support the dictum, if it were now necessary to rule on the matter, considerations beyond the verbal difference to which the *Eastman* opinion pointed might be stated.

suit which had grown up under § 7 of the Sherman Act, in by far the larger number of antitrust cases, *i. e.*, for those not involving companies incorporated outside the United States. In them the fact that service may be dubious in the district of suit and can be assured only by causing process to run to another district, as in the *Eastman* case, presents no such obstacle to bringing and maintaining the suit as existed prior to § 12. The necessity, if it is that, for directing process to another district, creates at most some slight inconvenience and additional expense.

II.

In this case, however, we deal with a company incorporated outside the United States. But there can be no question of the existence of "jurisdiction," in the sense of venue under § 12, over Scophony in the Southern District of New York. To say that on the facts presented Scophony transacted no business "of any substantial character" there during the period covered by institution of the suit and the times of serving process would be to disregard the practical, nontechnical, business standard supplied by "or transacts business" in the venue provision. It would be also to ignore the fact that Scophony then and there was carrying on largely, if not exclusively, the only business in which it could engage at the time.

Scophony's operations in New York were a continuous course of business before and throughout the period in question here. They consisted in strenuous efforts not simply to save an American "investment," as is urged, but to salvage and resuscitate Scophony's whole enterprise from the disasters brought upon it by the war. As with such efforts generally, changes in method and immediate objective took place as each one tried in turn failed to work out. But those changes brought none in ultimate objective, namely, to find a mode of saving and profitably

exploiting the Scophony inventions; and none in the intensity or continuity with which that object was pursued in New York.

First was the phase of attempting to set up in this country as manufacturer and seller of television equipment. When that failed, the company turned to licensing and exploiting its patents by other means. This was done through the complicated arrangements for what practically if not also technically was a joint adventure with other companies. That project was carried out not merely through corporate forms and arrangements but by contracts binding the participating companies to the common enterprise, as well as the special medium of executing it, American Scophony. In this each corporate participant had its special functions, controls and restrictions created in part by share ownership in American Scophony, but also in important respects by contract both beyond the stock controls and dictating their character.[22] Finally, as the affairs of the keystone of the structure, American Scophony, came to and continued in stalemate, the immediate objective shifted once more, to getting out of the trap. Again the shift was in direct and constant pursuit of Scophony's primary and continuing object, to find a way to save and to exploit its patents.

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[22] *E. g.*, the hemispheric division of territories between the British and American interests; the exclusive licensing agreements which prevented Scophony from granting licenses to interested American companies; and the arrangements for the interchange of technical information were contractual, not charter limitations on corporate powers. The particular corporate medium used, American Scophony, and the refinements in its charter and by-laws giving General Precision and Productions an effective veto power over its operations were themselves aspects of the contractual undertakings embodied in the master agreement and the two supplemental agreements. The master agreement also designated the persons to become officers and directors of American Scophony, as representatives of both the British and the American interests.

This is a story of business in trouble, even desperate. We may have sympathy for the company's plight. But it does not follow that such continuing, intensive activities to save the business and put it on a normal course, even though shifting as they did in the successive winds that blew, did not constitute "transacting business" of "any substantial character." Nor can we say that any of the major shifts in tacking toward the ultimate end stopped or interrupted the course of the company's business activity. At no time was the drive toward achieving its basic objects suspended.

Appellee would avoid this view and its consequences by taking an entirely different conception of what took place. It emphasizes that Scophony's corporate objects, as stated in its charter, were to manufacture and sell television equipment. Hence it concludes that when all New York activity directly pointing to that end ceased, and was followed by the phase of seeking to exploit the patents through the arrangements centering around American Scophony, the British company ceased to be engaged in promoting its corporate objects and thus in carrying on or doing business in New York for the relevant statutory purposes. From then on, it is claimed, Scophony became concerned solely with creating and protecting an "investment," namely, in American Scophony's shares. Nor did Scophony resume the doing of business when that effort also failed and the final stage of seeking to break the impasse arrived, because manufacturing and sale of equipment were not revived.

To this view of the sequence of events appellee then seeks to apply this Court's decisions interpreting "found" under § 7 and similar requirements in application to manufacturing and selling companies,[23] and also the like

[23] *E. g., Cannon Mfg. Co.* v. *Cudahy Co.*, 267 U. S. 333; *Consolidated Textile Corp.* v. *Gregory*, 289 U. S. 85; *People's Tobacco Co.* v. *American Tobacco Co.*, 246 U. S. 79.

Eastman dictum concerning § 12. In doing this it seeks especially to invalidate the service by casting up from those decisions a check list of specific and often minor incidents of that sort of business done or not done as relevant to whether business is being carried on, and then matching against the list Scophony's New York activities as of the times of service.[24]

Obviously this view of the facts and of the determinative legal approach is at wide variance from the ones we have taken in dealing with the question of venue. But we do not find it necessary, in order to reject it for purposes of sustaining the service, to consider whether the process clause of § 12 should be given scope beyond that indicated by the *Eastman* dictum. For in any event we think that appellee and the District Court have misconceived the effects of the facts and of the decisions on which they rely, for determining the validity of the service in this case.

Certainly appellee's conclusionary premise cannot be accepted, that its sole authorized or actual business was manufacturing and selling equipment; or therefore the further one that no other activity on its behalf could constitute doing or engaging in business. Indeed it was authorized to take out, hold and exploit television patents, and doing this was certainly as much part of its business as manufacturing and selling the equipment they covered.

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[24] The catalogue emphasizes things not being done as of the dates of service, *e. g.*, maintaining an office, warehouse or place of business; owning realty or other physical property; keeping a staff of employees; having agents "other than counsel in this case and . . . Elcock"; keeping a telephone or a listing; making sales; conducting research; soliciting orders. Correspondingly appellee atomizes the things then being done into separate, disconnected events, *viz.*, stock ownership (in American Scophony); contracting with American Scophony and the other corporations for transfer and licensing of patents; activities to protect Scophony's American "interests" by resolving the impasse.

There is nothing to show that Scophony was restricted by its charter or otherwise to exploiting its patents exclusively by direct manufacture and sale. When therefore, after that method had failed, the company chose another, it was not ceasing to do business. That consequence did not follow merely because it discontinued the activities incident to continuing the discarded method.

The alternative one chosen was not a matter simply of licensing patents to others, for active exploitation by them. Nor was it only a casual act or acts of contracting. The whole framework of this phase of the New York activities was dictated by the master and supplemental agreements. These were not mere licensing arrangements, nor did they make Scophony nothing more than a shareholder for investment purposes, with only such a shareholder's voting rights and control in American Scophony. The contracts created controls in Scophony, and in the American interests as well, which taken in conjunction with the stock controls called for continuing exercise of supervision over and intervention in American Scophony's affairs.[25] We need not decide whether, in view of the agreements' continuing and pervasive effects, they could be considered as sufficing in themselves to make Scophony "found" within the New York district.[26]

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[25] See note 22 *supra*. Indeed the contracts shaped the nature of the corporate distribution of powers and voting rights, so as to make them conform to the over-all character and objects of the larger common enterprise. The charter and by-law provisions of American Scophony therefore not only were governed by the contractual arrangements but carried them into execution.

[26] Especially in view of the fact that § 12 fixes venue and the places for serving process in antitrust suits, there would seem to be sound basis for differentiating the execution of agreements so all-pervasive and far-reaching in their effects upon the statutory policies from run-of-mine casual or intermittent sales of commodities by a manufacturing or selling company, for the section's purposes.

Whether so or not, they set the pattern for a regular and continuing program of patent exploitation requiring, as we have said, Scophony's constant supervision and intervention.

That necessity was shown, among other ways, by the contractual provisions for interchange of data and information, and further by the fact that there was sustained interchange of correspondence between Levey and Scophony devoted to Scophony's affairs and interests in this country. Levey kept Scophony informed fully of all that went on here, and in turn received and carried out its instructions respecting American Scophony's affairs and its own.

In all this he was not acting merely as an officer of American Scophony. Rather he was also Scophony's director and representative, authorized to act in its behalf and interest. Indeed it was as Scophony's representative that he was named as president of American Scophony. His position was a dual one. He was not a mere shareholder's or investor's agent seeking information about that corporation's affairs for purposes of dealing with the stock. His functions and activities were much broader and related to Scophony's interests as much as to American Scophony's. Scophony's New York activities therefore were not confined to negotiation and execution of the agreements. Neither were they concerned only with mere stock ownership or "investment" as is urged, nor were they simply occasional acts of contracting, like those in the decisions appellee cites.

Moreover, other individuals carried on for Scophony in continuing efforts [27] to resolve the impasse. Apart from what was done by others, Elcock came to New York with unrestricted and irrevocable power to act on Scophony's behalf. Indeed it might almost be said, in view

[27] See note 7.

of his triple position as mortgagee, corporate officer and attorney-in-fact, that for all relevant purposes at this phase of Scophony's activity, he was the company. The stalemate put Scophony's affairs in this country at a standstill along with those of American Scophony. And Scophony's efforts to extricate itself were both strenuous and continuous.

Those efforts were not cessation of engaging in business. They were directed entirely to warding off that fate. Their object was not to liquidate, it was to resuscitate the business of Scophony and, as in all previous stages, put it on a normal course again. In doing all this, Scophony was engaging in business constantly and continuously, not retiring from it or interrupting it. Cf. *Mutual Life Insurance Co.* v. *Spratley*, 172 U. S. 602; *Pennsylvania Lumbermen's Insurance Co.* v. *Meyer*, 197 U. S. 407; *St. Louis S. W. R. Co.* v. *Alexander*, 227 U. S. 218. The interruptions were only in particular phases of its authorized adventure, not in the continuity, intensity or totality of the adventure itself.

In sum, we have no such situation as was presented in the manufacturing and selling cases on which appellee relies. They concerned entirely different facts and enterprises. In none was there a shifting from a course of business in pursuit of one corporate object or objects, *viz.*, manufacturing and selling, to another continuing mode of achieving a basic corporate objective, namely, the exploiting of patents by complex working arrangements partaking practically of the character of a common enterprise with others and requiring constant supervision and intervention beyond normal exercise of shareholders' rights by the participating companies' representatives *qua* such.

We know of no decision which has held or indicated that on such facts the process clause of § 12 is not adequate to confer power to make valid service. Such a

continuing and far-reaching enterprise is not to be governed in this respect by rules evolved with reference to the very different businesses and activities of manufacturing and selling. Nor, what comes to the same thing, is the determination to be made for such an enterprise by atomizing it into minute parts or events, in disregard of the actual unity and continuity of the whole course of conduct, by the process sometimes applied in borderline cases involving manufacturing and selling activities.

For present purposes those decisions may be left untouched for the facts and situations in which they have arisen and to which they have been applied. But there could be no valid object in expanding their pulverizing approach to situations as different and distinct as this one, comprehended within neither their rulings nor their effects. More especially would such an extension be inappropriate, when it is recalled that § 12 governs venue and service in antitrust suits against corporations. For, in cases against companies incorporated outside the United States, that extension would bring back all the obstacles to enforcement of antitrust policies and remedies which existed for domestic corporations before § 12 was enacted to give relief from those obstacles. Even though venue were clearly established, as here, the extension often would make valid service impossible, since process could not be issued to run for such corporations to the foreign countries of which they are "inhabitants." We are unwilling to construe § 12 in a manner to bring back the evils it abolished, for situations not foreclosed by prior decisions, and thus to defeat its policy together with that of the antitrust laws, so as to make another amendment necessary.

We think that Scophony not only was "transacting business" of a substantial character in the New York district at the times of service, so as to establish venue there, but also on the sum of the facts regarding its

activities was "found" there within the meaning of the service-of-process clause of § 12. Of course such a ruling presents no conceivable element of offense to "traditional notions of fair play and substantial justice." See *International Shoe Co.* v. *Washington*, *supra*, at 316; cf. *Hutchinson* v. *Chase & Gilbert*, 45 F. 2d 139, 141.

It remains only to say that we do not stop to consider whether, as is argued, Levey's authority to act for Scophony had expired or been revoked at the time service was made by delivery of process to him. For when service was made by delivery to Elcock, he had unrevoked and irrevocable authority to act in Scophony's behalf in the New York district, and that service was valid to confer personal jurisdiction over Scophony.

Accordingly, the judgment is reversed and the cause is remanded to the District Court for further proceedings in conformity with this opinion.

Reversed and remanded.

MR. JUSTICE JACKSON concurs in the result.

SUPREME COURT OF THE UNITED STATES

No. 41.—October Term, 1947.

The United States of America, Appellant, *v.* Scophony Corporation of America, General Precision Equipment Corporation, Television Productions, Inc., Paramount Pictures, Inc., Scophony Limited, et al.	Appeal from the District Court of the United States for the Southern District of New York.

[April 26, 1948.]

Mr. Justice Frankfurter, concurring.

I deem it appropriate to state why I concur merely in the Court's result.

The only question in this case is whether Scophony Limited, a British corporation, which has its offices and principal place of business in London, may be made a party defendant in a suit by the United States for violation of the Sherman Law pending in the Southern District of New York. The corporation may be brought into court in that District if its activities there satisfy the requirements of § 12 of the Clayton Act. According to this provision, Scophony Limited is properly a party defendant in this suit only if, by virtue of its activities, it is "found or transacts business" in the Southern District of New York, and it may be served in that District if it is "found" there.

Whether a corporation "transacts business" in a particular district is a question of fact in its ordinary untechnical meaning. The answer turns on an appraisal of the unique circumstances of a particular situation. And a corporation can be "found" anywhere, whenever

the needs of law make it appropriate to attribute location to a corporation, only if activities on its behalf that are more than episodic are carried on by its agents in a particular place. This again presents a question of fact turning on the unique circumstances of a particular situation, to be ascertained as such questions of fact are every day decided by judges.

What was done in the Southern District of New York on behalf of Scophony Limited, as detailed in the Court's opinion, establishes that the corporation was there transacting business and was found there in the only sense in which a corporation ever "transacts business" or is "found." Accordingly, Scophony Limited was amenable to suit and service in the District within the requirements of § 12 of the Clayton Act.

To reach this result, however, I do not find it necessary to open up difficult and subtle problems regarding the law's attitude toward corporations. I abstain from joining the Court's opinion not because I am in disagreement with what is said but because I am not prepared to agree. And I am not prepared to agree because I do not wish to forecast, which agreement would entail, the bearing of the Court's discussion upon situations not now before us but as to which such theoretical discussion is bound to be influential. Law, no doubt, is concerned with "practical and substantial rights, not to maintain theories." *Davis* v. *Mills*, 194 U. S. 451, 457. But theories often determine rights. Since I do not know where the opinion in this case will take me in the future, I prefer to reach its destination by the much shorter route of recognizing that a corporation as such never transacts business and is never found anywhere, but does "transact business" and is "found" somewhere by attribution to the corporation of what human beings do for it. No doubt legal reasoning must be on its guard not to oversimplify. Dangers also lurk in overcomplicating.

From earliest times the law has enforced rights and exacted liabilities by utilizing a corporate concept—by recognizing, that is, juristic persons other than human beings. The theories by which this mode of legal operation has developed, has been justified, qualified, and defined are the subject-matter of a very sizable library. The historic roots of a particular society, economic pressures, philosophic notions, all have had their share in the law's response to the ways of men in carrying on their affairs through what is now the familiar device of the corporation. Law has also responded to religious needs in recognizing juristic persons other than human beings. Thus, in the Hindu law an idol has standing in court to enforce its rights. See, *e. g.*, *Pramatha Nath Mullick* v. *Pradyumna Kumar Mullick*, 52 L. R. I. A. 245 (1925). Attribution of legal rights and duties to a juristic person other than man is necessarily a metaphorical process. And none the worse for it. No doubt, "metaphors in law are to be narrowly watched," Cardozo, J., in *Berkey* v. *Third Avenue R. Co.*, 244 N. Y. 84, 94. But all instruments of thought should be narrowly watched lest they be abused and fail in their service to reason.